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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 1204

EARLE COWEN,
Petitioner,

vs.

ROBERT A. HEINZE, Warden of the State Prison at Folsom, California, etc.,
Respondent.

RESPONDENT'S BRIEF ON APPLICATION FOR A WRIT OF CERTIORARI.

STATEMENT OF PROCEEDINGS.

The facts upon which there appears to be no dispute are as follows:

Two informations were filed against petitioner in the Superior Court of the State of California, in and for the County of Los Angeles. In the first (action No. 39224) he was charged and convicted of attempt to commit robbery; in the second (action No. 39425)

he was charged and convicted in count one of robbery, first degree, and in count two of rape. On May 19, 1930, judgments were entered against petitioner by which he was committed to the State Prison under each charge for the term prescribed by law, pursuant to the Indeterminate Sentence Act (*Penal Code,* Section 1168). The trial Court also found he was previously convicted of a felony and served a prison term thereon. The judgments under counts one and two of action No. 39425 were ordered to run concurrently. No order was made by the trial Court as to how the judgment in action No. 39224 was to run. His term of imprisonment began June 6, 1930 upon his delivery to the Warden of said State Prison (Penal Code, Section 2900). On December 27, 1933 his sentences were fixed by the Board of Prison Terms and Paroles (now Adult Authority) at twenty years each on counts one and two of action No. 39425, to run concurrently, and at five years in action No. 39224, to run consecutively with said counts one and two, aggregating the term of twenty-five years. On June 22, 1944 he was granted parole by the Adult Authority on the last ten months of his sentence, and on October 11, 1944 he was released on parole. On April 16, 1945 his parole was suspended for the violation of the terms and conditions thereof, and on June 8 or 11, 1945 his parole was revoked and again on July 17 when his time credits were forfeited, and, pursuant to a standing resolution adopted by the Adult Authority, applying to all prisoners alike, the maximum sentences provided by statute were im-

posed, save in the case of a life sentence, which, pursuant to said resolution, was set at fifty years.

The maximum sentence on first degree robbery is life. (*Penal Code,* Section 213.) See:

People v. McNabb, 3 Cal. (2d) 441, 444, 445 (45 Pac. (2d) 334).

And on rape, fifty years (*Penal Code,* Section 264), and on attempted robbery, twenty years. (*Penal Code,* Section 664.) The term of sentence imposed upon revocation of petitioner's parole aggregates seventy years, which was made subject to further order of the Adult Authority.

JURISDICTIONAL GROUNDS ASSIGNED BY PETITIONER.

The jurisdictional grounds assigned by petitioner are substantially as follows:

(a) While conceding the Adult Authority had the power to revoke petitioner's parole, he contends the manner by which it was revoked was in violation of the due process clause of the 14th Amendment to the *Federal Constitution* and amendment 5 to said Constitution;

(b) That the punishment imposed upon the revocation of his parole and the forfeiture of his time credits is in violation of the 8th amendment to the *Federal Constitution* as constituting cruel and inhuman punishment;

(c) That the refixing of his sentence under Section 1168, *Penal Code,* as amended in 1931, subsequent to his conviction, is in legal effect *ex post facto* legislation as to him.

I. THE PETITION PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Both amendments 5 and 8 to the *Federal Constitution* have no application to state statutes or laws. They are confined to federal legislation. As to the 6th amendment, see:

Collins v. Johnston, 237 U. S. 502 (59 L. Ed. 1071);

Eilenbecker v. District Court of Plymouth County, 134 U. S. 31 (33 L. Ed. 801);

Pervear v. Commonwealth, 72 U. S. 475 (18 L. Ed. 608).

As to the 5th amendment to the *Federal Constitution,* see:

Feldman v. United States, 322 U. S. 487, 490, 491 (88 L. Ed. 1408);

Barron v. Baltimore, 32 U. S. (7 Peters) 242.

This Court may not review final judgments and decisions of a state Court where a substantial federal question is not involved:

Honeyman v. Hanan, 300 U. S. 14, 18 (81 L. Ed. 476);

Whitney v. California, 274 U. S. 357, 360 (71 L. Ed. 1095);

Zucht v. King, 260 U. S. 174 (67 L. Ed. 194);
Sugarman v. United States, 249 U. S. 182, 184 (63 L. Ed. 550).

The issues raised in petitioner's application on certiorari concern the revocation of parole and the forfeiture of time credits, neither of which involve vested rights; they constitute acts of grace solely within the discretion of the Adult Authority.

In Re Taylor, 216 Cal. 113, 115 (13 Pac. (2d) 906);
In Re Bogden, 193 Cal. 21 (222 Pac. 353);
In Re Mann, 192 Cal. 165 (219 Pac. 71);
In Re Cowen, 27 A. C. 655 (166 Pac. (2d) 279);
In Re Tobin, 130 Cal. App. 371, 373, 374, 375 (20 Pac. (2d) 91);
United States v. Nicholson, 78 Fed. (2d) 468, 470;
Wald v. Hiatt, 56 Fed. Supp. 504, and authorities infra.

Since the rights complained of by petitioner are not vested rights, no substantial federal question has been presented by petitioner's application.

Collins v. Johnston, 237 U. S. 502 (59 L. Ed. 1071);
In Re Allen, 27 Cal. App. (2d) 447, 450 (81 Pac. 168).

Nor is Section 1168, *Penal Code,* as amended in 1931 (Stats. 1931, Ch. 483, p. 1053), nor Section 2940,

Penal Code (Stats. 1941, Ch. 106, Section 15), *ex post facto* as applied to petitioner.

In Re Cowen, 27 A. C. 655 (166 Pac. (2d) 279);

In Re Hicks, 28 Cal. App. (2d) 671 (83 Pac. (2d) 73).

Nor is this Court concerned where a mere question of the construction of a state statute or law is involved.

The question as to how it shall be construed is a matter solely for the state Courts and their construction is conclusive, unless the construction placed upon such statute or law is repugnant to the *Federal Constitution* or federal laws, in which event it may present a federal question within the jurisdiction of this Court.

Herbert v. Louisiana, 272 U. S. 312, 316 (71 L. Ed. 270);

Guaranty Trust Co. v. Blodgett, 287 U. S. 509 (77 L. Ed. 463);

Supreme Lodge, Knights of Pythias v. Meyer, 265 U. S. 30, 32, 33 (68 L. Ed. 885);

Quong Ham Wah Co. v. Industrial Accident Commission of the State of California, et al., 255 U. S. 445, 448 (65 L. Ed. 723).

II. THE ADULT AUTHORITY HAD THE POWER AND AUTHORITY TO IMPOSE MAXIMUM SENTENCES UNDER THE OFFENSES OF WHICH PETITIONER WAS CONVICTED UPON THE REVOCATION OF HIS PAROLE.

At the time of the sentence of petitioner on May 19, 1930, Section 1168, *Penal Code,* as amended in 1929 was then in force and read in part:

> "The state board of prison directors shall determine after the expiration of the minimum term of imprisonment provided by law, except that in cases in which the minimum term of imprisonment is more than one year, the state board of prison directors may determine after the expiration of one year from and after the actual commencement of such imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the governor of the state. The term of imprisonment so fixed by the state board of prison directors, shall not thereafter be increased or diminished by said board for any reason whatsoever except as in this section provided. In all cases there may be allowed to apply upon the term of imprisonment fixed such credits for meritorious conduct and diligent labor as are or may be authorized by law." (Stats. 1929, Ch. 872, p. 1930.)

Petitioner's imprisonment began June 6, 1930, and on December 27, 1933 the Board of Prison Terms and Paroles originally fixed his sentence as aforesaid. At this time Section 1168, *Penal Code,* as amended in 1931 was in force and effect, and in this connection read:

"In case any convicted person undergoing sentence in any of the state prisons commits any infraction of the rules and regulations of the prison board, or escapes while working outside such prison under the surveillance of prison guards, the board of prison directors may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convicted, unless the sentence be sooner terminated by commutation or pardon by the governor of the state. Such revocation and redetermination shall not be had except upon a hearing upon the question of such infraction or escape and an adjudication by the board that such prisoner was guilty thereof, which adjudication shall be final. At such hearing such prisoner, unless outside the walls of the prison as an escape and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf."

This section was made applicable to all prisoners.

On April 16, 1945, petitioner's parole previously granted was suspended pending the disposition of a complaint filed against him which alleged four violations of the terms and conditions of his parole. (Exhibit "A" annexed to petition filed in State Supreme Court August 17, 1945.) On June 8th or 11th, 1945, the complaint was presented to the Adult Authority and his parole revoked. (Exhibit "A" annexed to Return.)

A written notice dated July 2, 1945, of the time and place of the hearing before the Adult Authority, together with a copy of the complaint against petitioner, was served upon him and on July 17th a hearing was had thereon before the board when his parole was again revoked and his time credits, earned and to be earned, were forfeited. (See Exhibit "G" annex to Return.)

Petitioner contends Section 1168, *Penal Code* as amended in 1929, in force at the time of his conviction, should apply, under which he argues the Board of Prison Terms and Paroles was without power to change or refix his sentences after they were originally fixed December 27, 1933, and that Section 1168, *Penal Code* as amended in 1931 giving the Board of Prison Terms and Paroles the power to fix and refix his sentence is *ex post facto* and therefore unconstitutional and void as to him. The language above quoted from Section 1168, *Penal Code* as amended in 1931, was carried over into the section as it was amended in 1933 (Stats. 1933, p. 2156) and Section 3020, *Penal Code,* upon the subject now reads:

> "In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the board may determine and redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State." (Stats. 1941, p. 1110, effective August 21, 1933.)

Section 3025, *Penal Code,* reads:

> "The provisions of this article are to apply to all prisoners now serving sentence in the State prisons, to the end that at all times the same provisions relating to the imprisonment of prisoners shall apply to all the inmates thereof." (Stats. 1941, Ch. 106, Section 15.)

The only time limitation set forth in Section 1168, as amended in 1929, for the fixing of sentences is that it shall not be fixed by the board until after the termination of one year from the date of imprisonment. Petitioner's sentence began June 6, 1930. Hence the board acted within the scope of the statute in originally fixing petitioner's sentences December 27, 1933. Whether the statute as it read at the time petitioner's sentences were fixed by the board, or as it read at the time they were refixed by the Adult Authority applies, the result is the same since in each instance the power to fix and refix sentences is reserved.

A similar issue was raised in *In re Hicks,* 28 Cal. App. (2d) 671 (83 Pac. (2d) 73), in which the petitioner in that case contended Section 1168, *Penal Code* as amended in 1929, and in force at the time of the commission of the offense, applied and that the section as amended in 1931, in force at the time the petitioner's sentence was refixed on the revocation of his parole, was *ex post facto* as to him. The Court after holding that a statute to be *ex post facto* must deprive one of a vested right, citing as authority, among others, *Calder v. Bull,* 3 Dall. (U. S.) 386, 1 L. Ed. 648, said on page 673:

"We are of the opinion the petitioner was not deprived of vested rights with respect to the term required by law to be fixed at the time of the commission of the offense. The law did not authorize the board to fix his term of imprisonment until after he had completed the minimum period of time prescribed by Section 461 of the Penal Code. The petitioner was committed to prison February 12, 1931. The board, therefore, could not fix his term of imprisonment until after February 12, 1932. In the meantime Section 1168 was amended. The amended section specifically repealed the former act. That amendment became effective August 14, 1931, authorizing the board for violation of prison rules or parole to rescind an order fixing the time of imprisonment and to increase the term previously determined to any time within the maximum period prescribed by Section 461."

The state Supreme Court in the instant proceeding in *In re Cowen,* 27 A. C. 655 (166 Pac. (2d) 279), quoting from 127 *A. L. R.* 1203, 1207, 1208, at page 662, said:

"'In a very few cases in which unsuccessful attempts have been made, upon the ground of forfeiture for misconduct after incarceration, to take away from prisoners good-time allowances which they had earned, the Courts have taken the view that, at least under the particular circumstances, the right to, or privilege of obtaining, the allowances had fully accrued, and accordingly were not subject to withdrawal, modification, or denial, except as clearly authorized by statute * * * But, in the great majority of cases involving forfeiture of good-time allowances for misconduct prior to termination of the sentence, the

view has prevailed that the privilege of obtaining such allowances, *being not a vested right,* may properly be withdrawn, modified, or denied in the event of specific acts of misconduct, or perhaps misconduct generally, depending upon the wording of the statutory provisions in that regard.'" (Emphasis ours.)

In re Tobin, 130 Cal. App. 371 (20 Pac. (2d) 91), at pages 374, 375:

"As said in another case, when passing upon the right of a court to revoke a probation order: 'From the nature of the subject, the whole matter of granting and revoking suspensions must rest in the discretion of the court.' Here, from the very nature of the case, the whole matter of granting or revoking paroles, or of allowing or forfeiting credits, must rest in the sound discretion of the board of prison terms and paroles. The petitioner, during this parole, was not freed from the consequences of his guilt. The granting of the parole to him was not a matter of right, but a matter of privilege, or rather, a matter of grace, as expressed in some of the opinions. The power of the board to revoke without notice, as expressed in the statute, precludes the idea of there being any vested right in the petitioner to remain outside of the prison walls."

See also:

U. S. ex rel. Anderson v. Anderson, 76 Fed. (2d) 375;

Fox v. Sanford, 123 Fed. (2d) 334, 335;

U. S. v. Anderson, 8 Fed. Supp. 812, 814.

Nor does the granting or forfeiture of time credits involve vested rights.

In re Taylor, 216 Cal. 113, 115 (13 Pac. (2d) 906):

> "It is well settled that a prisoner is not entitled as of right to credits (citing authorities), nor may they be accorded automatically by operation of law, but in addition to being earned must be allowed by affirmative action of the Prison Board."

See also:

In re Bogden, 193 Cal. 21 (222 Pac. 353);
In re Mann, 192 Cal. 165 (219 Pac. 71);
U. S. v. Nicholson, 78 Fed. (2d) 468, 470;
Wald v. Hiatt, 56 Fed. Supp. 504;
Jarman v. United States, 92 Fed. (2d) 309.

Indeed, petitioner had no vested right to have his sentences fixed for any period of time less than the maximum provided by law, and at no time have his sentences been fixed to exceed the maximum.

Neither the revocation of parole nor the forfeiture of time credits involves due process.

In re Allen, 27 Cal. App. (2d) 447, 450 (81 Pac. 168):

> "Such action by the Board is, like any similar administrative determination, subject to rescission or modification at the will of the Board and is not restricted by the rules of due process, notice, and hearing which apply to and limit the deprivation of a vested right arising out of the prior action of an administrative body."

In re Young, 121 Cal. App. 711, 715 (10 Pac. (2d) 154);
Milliken v. McCauley, 20 Fed. Supp. 202, 205.

It thus appears that both the granting and revocation of parole and the granting and forfeiture of time credits do not involve vested rights, they are mere acts of grace to be given and rescinded within the discretion of the Adult Authority. They do not concern due process and hence are not the subject of a substantial federal question.

III. THE CONCURRENT SENTENCES OF TWENTY YEARS EACH IN ACTION NO. 39,425 AND FIVE YEARS IN ACTION NO. 39,224, AGGREGATING TWENTY-FIVE YEARS, RUN CONSECUTIVELY BY OPERATION OF LAW.

The trial Court did not indicate in the judgments pronounced whether the concurrent sentences of twenty years and the sentence of five years were to run concurrently or consecutively. This resulted in their running consecutively by statutory mandate. At the time of petitioner's sentence by the trial Court, Section 669, *Penal Code* as enacted in 1927, was in force. (Stats. 1927, p. 1056.) It then read:

> "When any person is convicted of two or more crimes the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be; provided, that in exceptional cases the judgment, in the discretion of the court, may direct that such terms of imprisonment, or any of them, shall run concurrently."

See also:

People v. Ferlin, 203 Cal. 587, 603 (265 Pac. 230);

In re Radovich, 61 Cal. App. (2d) 177, 182 (142 Pac. (2d) 325);

In re Crawford, 109 Cal. App. 33, 34 (292 Pac. 520).

IV. THE CONSECUTIVE SENTENCES IMPOSED MUST BE REGARDED AS ONE CONTINUOUS SENTENCE OF TWENTY-FIVE YEARS FOR THE PURPOSE OF GRANTING OR FORFEITING TIME CREDITS.

Petitioner takes the position that these consecutive sentences must be treated separately and that the concurrent terms of twenty years each for rape and robbery with the deduction of time credits were satisfied before his sentences were refixed and his time credits forfeited by the Adult Authority, and that there cannot be a revivor of these time credits for the purpose of forfeiture and that the forfeiture of time credits is limited to the unexpired five year term, citing *In re Shull,* 23 Cal. (2d) 745, 753 (146 Pac. (2d) 417), which holds that when once a prisoner has been allowed credits and by such allowance his term has expired, said time credits may not thereafter be revived for forfeiture after the expiration of his reduced term.

However, in *In re Albori,* 218 Cal. 34, 37 (21 Pac. (2d) 423), the question arose as to whether the statutes in force at the time of the petitioner's conviction

applied, or under the statute as it existed at the time the case was considered by the Court. The petitioner in that case began his sentence April 29, 1929. His prison terms were fixed by the Board of Prison Terms and Paroles October 28, 1931, on two counts at seven years each, to run consecutively. The state Supreme Court on page 35 said in that connection:

> "This proceeding has arisen by reason of a difference of opinion as to the manner of computing the time credits to which petitioner is entitled. The parties seek the opinion of this court as to whether said credits 'are to be calculated under the statute in force at the time of his conviction or should be calculated under the statute now in force'. Section 1168 of the Penal Code, which now provides for such time credits, has been amended twice since petitioner entered the prison, but subdivision 6 thereof provides, 'The provisions of this section are to apply to all prisoners now serving sentences in the state prison.' We believe it clear that petitioner's time credits are to be calculated under the provisions of said section as amended. (See *In re Kepford,* 217 Cal. 538 (20 Pac. (2d) 333).)"

The question as to whether the two consecutive terms of seven years each imposed were to be considered as one continuous term of fourteen years or two separate terms of seven years each for the calculation of the forfeiture of time credits turned upon the construction of the phrase "term of confinement" contained in Section 1168, *Penal Code,* then under consideration in that case. On page 37 the Court said in this connection:

"Under the present wording of said Section 1168, the word 'term' is qualified by the use of the expression 'term of confinement'. Such expression conveys the thought of a 'continuous period of imprisonment' and we believe that it should be construed to have the same effect for the purpose under discussion as the expression 'entire term of penal servitude'. We therefore conclude that petitioner's 'term of confinement' within the meaning of that section was fourteen years and that his time credit reductions should be computed upon such 'term of confinement' rather than upon two separate terms of seven years each. This being the case, petitioner is now entitled to his release upon parole."

The same language of Section 1168, *Penal Code,* considered in the *Albori* case, was carried over into Section 2920, *Penal Code* (Stats. 1941, Ch. 106, Sec. 15), which reads in this connection:

"Every prisoner who has committed no infraction of the rules or regulations of the prison, or the laws of the State, and who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties and tasks assigned to him to the satisfaction of the prison officials, and in whose behalf the warden of the prison shall file a report certifying that his conduct and work have been satisfactory and recommending allowance of time credits to him, shall upon, but not until, the adoption of such recommendation by the board, be allowed time credit reductions from his term of confinement (instead of and in lieu of such time credits as were heretofore allowed by law) a deduction of two months in each of the first two years, four months in each

> of the next two years, and five months in each of the remaining years of said term, and correspondingly for any part of the year, where such term of confinement is for more or less than a year * * *"

This section contains a limitation as to the scope of the application of this phrase which would lend weight to the construction placed upon it by the *Albori* case, since this limitation was added to the section subsequent to the decision in the *Albori* case. It reads:

> "The phrase 'term of confinement' as used herein shall not in any case be construed to include sentences for crimes committed while under commitment to a State prison but in all such cases the credits shall be computed on the separate sentence resulting from such conviction."

It will be observed, however, that this limitation has no application to petitioner in the proceeding before this Court since he was not under commitment to a state prison when convicted and sentenced by the trial Court.

Section 2926, *Penal Code,* a part of the same article in which Section 2920 appears, reads:

> "The provisions of this article are to apply to all prisoners now serving sentence in the State prison, to the end that at all times the same provisions relating to credits shall apply to all the inmates thereof."

Both these sections are now in force and were ever since their enactment. As previously indicated the forfeiture of time credits does not involve a vested

right and are contingent only until the time arrives when their allowance will end imprisonment.

In re Cowen, 27 A. C. 655, 666 (166 Pac. (2d) 279).

A number of federal authorities are cited by the state Supreme Court in the *Cowen* case at page 661 in support of these views.

See also:

U. S. v. Nicholson, 78 Fed. (2d) 468, 470.

Under a continuous sentence of twenty-five years with the deduction of all time credits allowable, petitioner had approximately a year yet to serve when his time credits were forfeited and his sentence refixed. Hence *In re Shull,* supra, has no application.

Moreover, the section construed in the *Albori* and *Cowen* cases involves a reasonable construction of said statute and such construction is not within the scope of consideration by this Court. The construction applied by the state Court is conclusive.

V. PETITIONER WAS GIVEN A HEARING ON THE COMPLAINT FILED AGAINST HIM PRIOR TO THE FORFEITURE OF HIS CREDITS.

A prisoner's parole may be revoked without notice and his return to prison ordered.

Penal Code, Section 3060 (Stats. 1941, Ch. 106, Section 15);

In re Etie, 27 A. C. 773 (167 Pac. (2d) 203);

In re Tobin, 130 Cal. App. 371, 374 (20 Pac. (2d) 91).

He is entitled, however, to a hearing by the Adult Authority when the forfeiture of his time credits is considered.

Penal Code, Section 2940 (Stats. 1941, Ch. 106, Section 15).

A notice of time and place of hearing before the Adult Authority, dated July 2, 1945, together with a copy of the complaint, was given petitioner. The complaint stated four counts of violations of his parole. (Exhibit "A" annexed to Petition filed in State Supreme Court August 1, 1945.) The hearing was held between July 16th and 18th, 1945. Petitioner pleaded guilty to counts one and two and not guilty to counts three and four. He was found guilty on count three, and count four was dismissed. His parole was again revoked and his credits earned and to be earned were forfeited. It thus appears petitioner was given a hearing.

We desire to comment briefly upon another point raised. It is argued the charges embraced in the complaint against petitioner were not well founded. Aside from the fact that there is no evidence in the record to support this contention, a state Court, much less this Court, will determine the sufficiency of the evidence to support the order of the Adult Authority in revoking petitioner's parole or the cancellation or forfeiture of his time credits.

In re Nelson, 185 Cal. 594, 595 (197 Pac. 947);

In re Taylor, 216 Cal. 113, 115 (13 Pac. (2d) 906);

Matter of Application of Stanton, 169 Cal. 607, 609 (147 Pac. 264);

Roberts v. Duffy, 167 Cal. 629 (140 Pac. 260);
In re Tobin, 130 Cal. App. 371, 374, 375 (20 Pac. (2d) 91);
In re Young, 121 Cal. App. 711 (10 Pac. (2d) 154).

CONCLUSION.

A petition for a writ of certiorari was previously filed in this Court and among the assignments of error on the same facts the question was presented whether the statutes here under consideration were *ex post facto* as to petitioner. The petition was denied March 27, 1939 as presenting no substantial federal question. (*Cowen v. California,* 306 U. S. 652 (83 L. Ed. 1051).)

It is submitted the petition here presents no substantial federal question and should be denied.

Dated, San Francisco, California,
June 26, 1946.

Respectfully submitted,
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